PP

v.

NG PAK NANG

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL TRIAL NO: 45-06-2004]
22 APRIL 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 11.6 grams monoacetylmorphines and 10.44 grams heroin - Credibility of witnesses - Whether variations of testimonies could be construed adversely against credit of witnesses - Whether PW1's evidence relating to arrest of accused and seizure of drugs fully corroborated in material particulars by evidence of others - Defence of accused - Whether a simple denial - Whether insufficient without other proof to reasonably dislodge prosecution's case - Whether rebutted statutory presumption under s. 37(da)(iiia) Dangerous Drugs Act 1952*

The accused was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 21.6 grams of monoacetylmorphine and heroin (11.6 grams Monoacetylmorphines and 10.44 grams heroin). He was convicted of the same and sentenced to death. Briefly, PW1 with a team of officers had gone to a house No. 12 Jalan Daud, Muar at about 3.20pm. PW2 had positioned himself outside the window on the left side of the house facing a room where he saw the accused sitting on the floor in front of a one liter Yeo's Soya milk carton (exh. P9). Meanwhile, PW1 together with PW5 and one other detective proceeded to enter the house and identified themselves as 'Police!' PW2 heard the said identification remarks and saw the accused get up, grab the Yeo's soya milk carton and run to the door leading into the room. PW2 saw the accused bending, trying to push the said soya milk carton into a hole in the floor. PW1 managed to catch the accused by his shoulders, got him to stand up and seized the soya milk carton from the hands of the accused. Inside the said Yeo's Soya milk carton, PW1 found plastic packets and three bottles with yellowish granular and powdery substance suspected to be heroin and one 'Digi Prepaid Plus' aluminium container that contained plastic packets and three straw tubes containing yellowish powdery substance also suspected to be heroin. The chemist SP3

A confirmed that the powdery/granular substance found in the two small Yeo's Soya milk boxes and Digi Prepaid Plus aluminium were a mixture of monoacetylmorphines and heroin. At the end of the prosecution's case, the prosecution had made out a *prima facie* case against the accused on the charge proffered. The accused B was then ordered to enter his defence. The issues raised by the defence were (i) conflicting testimonies of prosecution witnesses on same issues; (ii) discrepancies in PW1's evidence in court and in his police report; (iii) failure of PW1 to weigh the drugs and ambiguity in the weight of the drugs seized; (iv) negatives of C photographs not produced; (v) visibility of hole in relation to the open door and reaction of the accused. It was the defence of the accused that he was in the said room watching television when the police busted into the room; he tried to get up but was prevented from doing so when the police pinned his shoulders D down and handcuffed him. He denied knowing where the drugs came from and did not know to whom the drugs belonged to. The accused, however, admitted that the said room was his; there was a hole in the floor which was not covered during the time of raid and he was a drug addict but not anymore and that at the E time of raid he was under medication to treat his addiction.

Held (convicting the accused of the offence; sentencing the accused to hang by rope by his neck until he is dead):

F **(1)** The conflicting evidence of the prosecution witnesses relating to *ie*, the position and existence of appliances in the room where accused was arrested were minor issues which had no effect on the credibility of the witnesses and could not have had any bearing on the prosecution's case. Discrepancies of these nature were bound to happen for the simple reason that G no two witnesses were endowed with the same powers of cognition, attentiveness and perception, resulting in different witnesses giving slightly different versions to a common event. On no account should such variations be construed adversely against the credit of the said witnesses. (para 24) H

(2) There were no discrepancies between PW1's evidence in court and his police report. What was testified in court was an in-depth description of what transpired during the raid and what he did during the raid. There was no legal requirement for I PW1 to put such details in his police report. Additionally, his police report was not the first information report. What was

more important was the fact that PW1's evidence relating to the events leading to the arrest of the accused and seizure of the drugs was fully corroborated in material particulars by the evidence of PW2 and PW5 notwithstanding that some of the details were not reported in his police report. (para 24)

(3) There was no legal requirement at all for PW1 or PW7 to weigh the drugs. It was noted that the gross weight of the drugs taken by PW7 was (219 grammes) whereas the gross weight taken by the chemist (PW3) was 208.14 grams. There was an ambiguity. However, there was no evidence as to the methodology adopted by the two witnesses in weighing the said drugs. In such event, it was irrelevant and unnecessary to delve into this issue. The actual weight of the offending drugs found by PW3 upon his analysis was relevant. (para 24)

(4) PW7 who took the photographs of the places and locations was available to authenticate the said photographs. He was cross examined on the photographs. The non-production of the negatives was not fatal. It did not create a dent on the prosecution's case for there were also other cogent evidence at the disposal of the prosecution stacked heavily against the accused. At best, the photographs could only act as pieces of corroborative evidence. (para 24)

(5) There was no issue over the visibility of the hole. Both PW1 and PW2 testified that the door did not block the hole even if the door was open. On the evidence, the hole was visible for all to see irrespective of whether the door was closed or opened. PW1 and PW2 both saw the accused bending down trying to push exh. P9 into the hole as soon as they entered the room. This was the crux of the prosecution's case pinning down the accused with the offending drugs. The evidence of PW1 and PW5 merely fortified what PW2 saw from outside the window of the room. (para 24)

(6) The accused, in his defence, claimed that he was immediately pinned down and saw the police searching around. In the same breath, he said that as he got up, he was shown the offending exhibit by the police. The evidence of the prosecution was a lot more cogent and probable. PW1 (and PW5) saw the accused bending down trying to push exh. P9 into the hole, caught the accused by his shoulders, got him

A to stand and seized exh. P9 from the hands of the accused. This was fortified by what was seen by PW2 from outside the window *ie*, the accused grabbed the said exhibit and ran towards the rear of the room and tried to push the said exhibit into the hole. (paras 24 & 29)

B

(7) The accused had testified that years earlier he was charged in court for an offence under s. 39A of the Act and was acquitted. PW7 was also the IO in that case and one of the members of the raiding party in this case was also a member C of the raiding party in that case. In short, the accused claimed that the police were trying to fix him with the commission of the present offence. However, the principal characters herein were PW1, PW2 and PW5. These three witnesses had nothing to do with the earlier case. In such event, it was D preposterous to suggest that these four witnesses colluded to fix the accused on a capital crime that carried the death penalty. There was no evidence at all to conclude such findings. PW1, PW2 and PW5 were truthful witnesses. Their testimonies were not something which was improbable. They E were public officials with no notice to propel them to testify adversely against the accused. Their credibilities were intact right to the end. (para 29)

(8) The accused's testimony that he was no longer a drug addict and was then under medication to rid his addiction was a F recent invention on account that it was never put to the prosecution witnesses. It was equally irrelevant for the purposes of his defence. It was never part of his defence that the offending drugs were for his personal consumption. The G defence of the accused was a simple denial. The accused merely denied that he was caught trying to push the offending exhibit into the hole, he denied he was arrested while in the act of doing so and he denied that the said offending exhibit was seized from his hand. Such denial was insufficient without H other proof to reasonably dislodge the prosecution's case. (para 29)

(9) The defence posited by the accused had not created any reasonable doubt against the prosecution's case. Equally the defence of the accused failed on the balance of probabilities, I to rebut the statutory presumption under s. 37(da)(iiia) of the

Act. The prosecution, on the other hand, had proved the offence against the accused beyond a reasonable doubt. The accused was thus found guilty. (para 30)

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 ***(refd)***
Johar Mustapha v. PP [2008] 5 CLJ 590 CA ***(refd)***
Leow Nghee Lim v. PP [1956] MLJ 28 ***(refd)***
Mohamad Radhi Yaacob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA ***(refd)***
Leow Nghee Lim v. PP [1956] MLJ 28 ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1950] MLJ 57 ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 115 ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(iiia), 39A, 39B(1)(a)
Evidence Act 1950, ss. 8, 114(g)

For the appellant - Diljit Kaur; M/s T-Hazalan & Co
For the prosecution - Mohd Ashrof Adrin Kamarul DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JC:

[1] The accused was charged with an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") for trafficking in 21.6 grams of monoacetylmorphine and heroin (11.6 grams Monoacetylmorphines and 10.44 grams heroin) at house No. 12, Jalan Daud, Muar at about 3.20pm on 6 May 2003. He was convicted of the same and sentenced to death.

Case For The Prosecution

[2] Acting upon information received on 6 May 2003, PW1 (ASP Robin) with a team of officers went to house No. 12, Jalan Daud, Muar at about 3.20pm. The said premises is an old

wooden banglow house raised on stilts about 3 to 4 feet above the ground. He had his men at strategic positions around the house in no time.

[3] PW2, Detective Corporal Abdul Wahab bin Mohd Noor, positioned himself outside the window on the left side of the house facing a room. In the said room he saw the accused sitting on the floor. He faced the left side body of the accused. In front of the accused was a one liter Yeo's soya milk carton (exh. P9). He was about 5 feet away from the accused and there was nothing to obstruct his view into the room. The curtain to the window was almost entirely pushed/drawn to the left side of the window (to PW2's left). Only the lower part of the window was curtained.

[4] Meanwhile PW1 together with PW5 and one Detective Corporal Aziz proceeded to enter the house. A series of steps led to the main door leading into the house. SP6, the accused's mother was sitting on one of the steps. PW1 identified himself "police!" to SP6.

[5] Outside the window, PW2 heard the said identification remarks by PW1. As soon as he heard this, he saw the accused get up, grab the Yeo's soya milk carton and hurriedly run to the door leading into the room. The accused appeared to be caught by surprise and also appeared frightened. On seeing this PW2 yelled "... belakang pintu nak buang barang ..." twice.

[6] PW2 next saw the accused bending, trying to push the said soya milk carton into a hole on the floor. The flooring of the house were of timber floorings.

[7] Moments later PW1, PW5 and Detective Corporal Aziz entered into the room. PW2 shouted again "... Tuan belakang pintu ...".

[8] Back to PW1. PW1 together with his two officers rushed into the room upon hearing PW2 yelling. The door to the room was opened. As soon as he entered the room he saw PW2 outside the window telling him "Tuan belakang pintu" with his hand pointing towards the accused. He saw the accused bending down trying to push a Yeo's soya milk carton into a hole on the floor, very close to the door. He caught the accused by his

shoulders and got him to stand up and seized the soya milk carton (exh. P9) from the accused's hand. Inside the said Yeo's Soya milk carton PW1 found:

(i) one small Yeo's Soya milk box containing one plastic packet of yellowish granular and powdery substance suspected to be heroin tied with rubber band;

(ii) one small Yeo's Soya milk box containing one plastic packet tied with rubber band and three small plastic bottles. Inside the plastic packet and the three bottles were yellowish granular and powdery substance suspected to be heroin; and

(iii) one "Digi Prepaid Plus" aluminium container. Inside this container were three small plastic packets containing yellowish granular and powdery substance and 33 straw tubes containing yellowish powdery substance. The substance were also suspected to be heroin.

[9] The investigating officer PW7 (ASP Mohd Yassin b. Sagap) had these exhibits examined by the chemist on 8 May 2005. The chemist, SP3 (Abdullah b. Mohd Yusof) confirmed that the powdery/granular substance found in the two small Yeo's Soya milk boxes and Digi Prepaid Plus aluminium container were a mixture of 11.16 grams of monoacetyl morphines and 10.44 grams of heroin. He also confirmed that these two drugs were listed in the first schedule of the Dangerous Drugs Act 1952.

[10] By and large there is no serious challenge over PW3's findings. I have therefore no hesitation in accepting the said findings.

Custody/Control Of The Said Incriminating Exhibits

[11] The evidence revealed that at the time of the seizure of the said incriminating exh. P9

– the accused was alone in the room at the time of seizure of the exh. P9.

– PW1 said that when he effected the arrest, the accused was alone in the room. PW1's evidence is wholly supported by the evidence of PW5 who entered the room with PW1.

– PW2 was the first officer who witnessed the going-ons in the room before PW1 made his entry, followed by PW5. He saw the accused alone in the room sitting on the floor. The incriminating exh. P9 was infront of the accused. He saw the accused get up, grab exh. P9 and run to the rear of room towards the door and tried to push exh. P9 into a hole on the floor. This hole is shown in photographs P13(10) and (11), circled in red by the witness PW1.

– the evidence of PW1, PW2 and PW5 were supported by the evidence of PW6, the accused's mother, who confirmed that the accused was the sole occupant of the room. She confirmed that the said room belonged to the accused and that the accused occupied and used the room to the exclusion of others. She confirmed that the accused used the room, stayed in the room and slept in the room.

– the photographs of the room, exh. P13(5), (7) and (9) confirmed that the said room is a habited room, equipped with basic necessities to make it habitable and in fact habitated.

– PW1's evidence is uncontroverted that he detained the accused while the accused was bending down trying to push the incriminating exh. P9 into a hole on the floor and upon the accused's detention, seized the said exhibit from the accused's hand. The evidence of both PW2 and PW5 wholly confirmed the testimony of PW1 in all material particulars.

Upon the facts and evidence enumerated above, I have no hesitation to find as a fact that the said incriminating exh. P9 was wholly under the custody and control of the accused. *Leow Nghee Lim v. PP* [1956] MLJ 28 of p. 29 – followed. Any other findings could well have been perversed.

[12] Learned counsel submitted upon the conflicting testimonies of PW1, PW2 and PW5 with the still pictures of exh. P13(7) and (9) in respect of the position of the curtain, sewing machine, coffee table and table fan. The said photographs showed that the curtain was entirely spread across the lower part of the window and tied to the table fan at the corner of the window. There was also the sewing machine placed infront of the window occupying more than a quarter of the space infront of the window. The

television was placed on top of the sewing machine and the coffee table was placed infront of the sewing machine. These articles would certainly have blocked PW2's view into the room.

[13] However, PW1 testified that at the time of the raid, the sewing machine was not there and the television was not located at the place shown in exh. P13(7). Neither was the coffee table. He added that the curtain was there and agreed that as shown in exh. P13(9) the curtain was spread across the window and the lower end was tied/clipped with the wire to the table fan. Nevertheless, he testified that at the material time he was there the entire curtain was drawn to the right. He also said that the table fan was also not there as shown in exh. P13(9) at the material time. His testimony in this respect was corroborated in material particulars by PW5.

[14] PW2 also testified that at the material time he was outside this window, the entire curtain was drawn/pushed to his left. The sewing machine and television were also not there as shown in the photographs. Neither was the cloth on top of the sewing machine and the coffee table infront of the sewing machine. His view into the room was unobstructed and he was able to clearly see what went on inside the room.

[15] I have no reason to dispute the evidence given by PW1, PW2 and PW5. Their testimonies were consistent enough and it has not been shown anywhere to justifiably treat their testimonies with suspect. Their evidence is credible enough to warrant its acceptance. Additionally it has not been shown that all three had an axe to grind against the accused to the extent that they are prepared to concoct their evidence.

Knowledge Of The Accused

[16] As enumerated earlier the evidence of PW2 showed that as soon as he (PW2) heard PW1 identifying himself as "police" to someone the accused got up, grabbed exh. P9, and ran towards the door to the room and proceeded to push the exhibit into the hole on the floor nearby. The accused also appeared surprised and frightened. PW5 also said the accused was also shivering/trembling.

[17] PW1's evidence revealed that when he entered the room, he saw the accused bending and trying to push exh. P9 into the hole on the floor. The accused was still holding exh. P9 when he was arrested by PW1. The accused also appeared frightened when he

A was arrested. The incriminating exhibit was seized from his hand. This much of the evidence was not really challenged by learned counsel.

[18] Now what can to be imputed from his (accused) conduct of
B grabbing the said exh. (P9) and trying to push the said exhibit into the hole upon hearing PW1 identifying himself to PW6? Section 8 of the Evidence Act 1950 pertaining to conduct is most relevant. At this stage, it is safe to presume that he must have heard PW1 identifying himself to PW6. PW2 who was outside the
C room heard it too. There was no challenge in this respect. Hence, it is my view that by so grabbing the said exh. P9 and trying to dispose off the said exhibit through the hole on the floor as soon as PW1 identified himself to PW6, the accused must have known what were the contents of exh. P9. Knowledge though cannot be
D proved by direct evidence, however could be inferred from the set of facts, evidence and circumstances surrounding the particular case – see *Parlan bin Dadeh v. PP* [2009] 1 CLJ 717; *Johar Mustapha v. PP* [2008] 5 CLJ 590 and *Samundee Devan a/l Kerishnan Muthu v. PP* [2009] 1 CLJ 498. The accused, based on
E the facts, must have been seized with the knowledge that exh. P9 contained the drugs that is now the subject matter of the charge hovering over his head. This is the only logical inference that can be inferred from the set of evidence adduced. There must be an explanation for the accused to want to have it disposed off upon
F hearing PW1 identifying himself to PW6. All the more so if he knew that there is nothing incriminating in the said exh. P9.

[19] Inspite of PW1's presence with his men in the room, the accused continued trying his luck to dispose off the exhibit
G through the hole. The accused desperately knew the contents of exh. P9 and desperately tried to dispose off the exhibit but in vain. On the facts, there can be no doubt of his state of mind, in so far as his knowledge of what was inside the said exh. P9 is concerned. His demeanour at the material time, ie, appearing
H surprised, shivering and frightened is equally of no help to the accused. In all the circumstances of the case, it merely strengthened the prosecution's case that the accused knew all along what was inside the said exh. P9 in the absence of any evidence or explanation to otherwise account for his behavioural
I pattern.

Possession Of The Incriminating Exhibit By The Accused

[20] The prosecution having proved custody/control and knowledge of the contents of exh. P9 on the part of the accused, it is my further findings that the accused was indeed having in his actual possession the said incriminating exh. P9. On the facts, he was well endowed with the powers to dispose off the said exhibits. Having custody/control, knowledge and power of disposal are the basic elements constituting possession. (See *Leow Nghee Lim v. PP* [1956] MLJ 28; *Chan Pean Leon v. PP* [1956] 1 LNS 17 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 at 338-339). On all fours, the prosecution's job is done.

[21] Now the combined weight of the drugs in the receptacles in exh. P9 exceeded the minimum statutory weight of 15 grams. It thus triggered the statutory presumption of trafficking as provided under s. 37(da) (iiia) of the Act. This is the learned DPP's submission. I am with him.

[22] In such event it would be superfluous and unnecessary to consider the learned DPP's alternative submission that prove of trafficking in the said drugs by the accused could also be proven through the application of the definition of trafficking provided in s. 2 of the Act though there are well founded merits in his arguments.

[23] It is my findings that at the end of the prosecution's case, upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case against the accused on the charge proffered. Should the accused remain silent the evidence adduced is sufficient to warrant his conviction. The accused was ordered to enter his defence. He opted to testify on oath.

[24] Issues Raised By The Defence

(i) Conflicting testimonies of prosecution witnesses on same issues.

Learned counsel took issue with the conflicting evidence of the prosecution witnesses relating as to when the information leading to the raid was received; who telephoned members of the raiding party for a meeting before the raid was conducted; time of raid; duration of raid; structure of house and the

position and existence of appliances in the room where accused was arrested. In my view, these issues are very minor issues, which have no effect on the credibilities of the said witnesses and would not have had any bearing upon the prosecution's case. It is accepted that discrepancies of the nature submitted by learned counsel are bound to happen for the simple reason that no two witnesses are endowed with the same powers of cognition, attentiveness and perception, resulting in different witnesses giving slightly different versions to a common event. On no account should such variations be construed adversely against the credit of the said witnesses.

As regards to the position and existence of appliances in the room, I have dealt with it in the earlier paragraphs.

(ii) Discrepancies in PW1's evidence in court and his police report exh. P6.

In his police report PW1 did not state that he heard PW2 yelling from where he was; made no mention that as soon as he entered the room he saw accused bending down trying to push the 1 litre Yeo's Soya milk carton into the hole on the floor; made no mention about PW2 pointing towards the door which was opened and telling him that the accused was behind the door and also did not state that when he got the accused to get up after arresting him, he saw the accused holding the Yeo's Soya milk carton in his hand.

In explaining the discrepancies as pointed out by learned counsel, PW1 explained that he made his report as brief as possible. I have no reason to dispute his explanation. Having perused his evidence in court and his police report, I am satisfied that there are no discrepancies in the mould as submitted by learned counsel. What was testified in court was an in-depth description of what transpired during the raid and what he did during the raid. There is no legal requirement for PW1 to put such details in his police report. Additionally his police report is not the first information report. In this episode, what is a lot more important is the fact that PW1's evidence relating to the events leading to the arrest of the accused and seizure of the said exh. P9 was fully corroborated in material particulars by the evidence of PW2 and PW5 not withstanding that some of the details were not reported in his police report. It would have been different if PW1 was the sole witness called to testify.

(iii) Failure of PW1 to weigh the drugs and ambiguity in the weight of the drugs seized.

There is no legal requirement at all for PW1 or the I.O (PW7) to weigh the drugs. Even if they do, it is immaterial for the purpose of charging the accused in court. It does not carry any evidentiary value.

Learned counsel also took issue on the gross weight of the drugs taken by PW7, which amounted to 219 grams whereas the gross weight taken by the chemist (PW3) was 208.14 grams. There is thus an ambiguity of 10.86 grams so it was submitted. However, we have no evidence as to the methodology adopted by the two witnesses in weighing the said drugs. If the methodology adopted by the two witnesses were different, it would certainly produce different readings.

However both witnesses were not asked over the methodology adopted. In such event, it is really irrelevant and unnecessary to delve into this issue. The actual weight of the offending drugs found by PW3 upon his analysis is relevant. This is all that matters.

(iv) Negatives of photographs not produced.

The photographs were taken by the I.O (PW7) himself on the day he investigated the premises. He confirmed the photographs were the photographs taken by him. He was able to give a full description of the places or locations captured by the photographs. However he lost the negatives in the confusion while packing up his belongings and vacating his office following his transfer to Sabah. Hence, learned counsel submitted that the missing negatives had prejudiced the accused. But I don't see how. PW7 who took the photographs is available to authenticate the photographs. He is available for cross examination and indeed he was cross examined on the photographs. The non production of the negatives is not fatal. The worst case scenario would be to rule the photographs to be inadmissible in evidence. Even so, it does not create a dent on the prosecution's case for there are other cogent evidence at the disposal of the prosecution stacked heavily against the accused. At best, the photographs could only act as pieces of corroborative evidence. Equally, the fact that PW1 did not disclose that he was with PW7 at the time the photographs were taken is of no consequence.

(v) Visibility of hole in relation to open door.

In my view, there is no issue over the visibility of this hole. PW2 could see it from where he was outside the house. The door was opened when PW1 and PW5 entered the room. Upon entering the room PW1 saw the accused trying to push exh. P9 into this hole. On both occasions, the door was opened. So too was PW5. When he entered the room with PW1 he saw the accused trying to push exh. P9 into this hole. The door was opened when PW5 saw this. Both PW1 and PW2 testified that the door does not block the hole even if the door is open. P13(11) shows the open door. The hole is visible. P13(8) shows the door closed. The hole is also visible. Therefore, there is no issue whether the hole is visible when the door to the room is open. On the evidence, the hole is visible for all to see irrespective of whether the door was closed or opened.

Under cross-examination, PW5 agreed with learned counsel's suggestion that the hole could be seen only if the door is closed. However during his re-examination he said that the hole is still visible if the door is open, consistent with his main body of evidence that he saw the accused pushing exh. P9 into this hole as soon as he entered the room through the opened door.

The additional issue of whether the accused went behind the door and was facing either the door or the wall as testified by PW2 is of not much relevance in the light of the evidence of PW1 and PW2 that they both saw the accused bending down trying to push exh. P9 into the hole as soon as they entered the room.

This is the crux of the prosecution's case pinning down the accused with the offending drugs. The evidence of both PW1 and PW5 merely fortified what PW2 saw from outside the window of the room.

(vi) Reaction of the accused.

Learned counsel submitted that it is inherently improbable that the accused would actually embrace the drugs and did what he did upon realizing that there was a raid. But in my view it is wrong to generalize on what others would do cornered

under the same circumstances. It has to do with one's state of mind and his instinctive reaction upon being confronted with such a grave situation. The accused knew he was trapped in his room with the offending drugs with no way out. His instinctive reaction is to do away with the drugs. The hole on the floor is his lifeline. He tried to gamble with his luck but failed. Indeed truth is sometimes stranger than fiction.

(vii) Section 114(g) of Evidence Act.

Learned counsel also urged upon me to invoke s. 114(g) of the Evidence Act against the prosecution. But she submitted no further of what is to invoked adversely against the prosecution under the section.

Learned counsel also submitted that the accused must be watching the tv if he was seen seated on the floor facing the tv as testified by PW2, which can only mean that the tv was on and that the sound of the tv would have drowned out PW1's identification of himself to PW6. PW2's screams from outside the house would also have been drowned out.

However, it was never put nor suggested to any of the witnesses that the accused was watching tv; the tv was on; that the sound of the tv would have drowned PW6's identification of himself and also PW2's screams. There were no evidence of these either.

In such event, it is my view that learned counsel's submission on these issues is verily without basis.

The Defence Case

[25] The burden upon the prosecution at this stage is to prove its case against the accused beyond a reasonable doubt, the meaning of which is indicated in *PP v. Saimin & Ors* [1971] 1 LNS 115. However, the defence is also encumbered with the burden of raising a reasonable doubt against the prosecution's case to earn an acquittal. Additionally since a statutory presumption was invoked, the accused must also rebut the said presumption on a balance of probabilities (*Public Prosecutor v. Yuvaraj* [1968] 1 LNS 115; *Mohamad Radhi b. Yaacob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311.

[26] In his defence the accused stated that he was in the said room watching tv when the police busted into the room. He tried to get up but was prevented from doing so when the police pinned his shoulders down. The police next showed him the Yeo's Soya milk carton (exh. P9). Thereafter he was handcuffed.

[27] The accused testified that he did not see any policemen outside the window; did not hear any screams from the police as he was watching tv; did not hold any boxes containing drugs as he was watching tv; the police went searching about in the room; did not know where exh. P9 came from; did not know where the police got exh. P9 from; the drugs seized by the police were not his and he does not know to whom the drugs belongs to. He also testified that the curtain, sewing machine, tv and coffee table were in the room and located at the positions shown in the photographs.

[28] The accused admitted however that the said room was his; he was alone in the room when the raid was conducted; there was a hole on the floor; the hole is visible only from inside the room; the hole was not covered at the time of the raid; he was a drug addict but not any more and that at time of raid he was under medication to treat his addiction.

[29] Court's Findings

(i) Having scrutinized all the available evidence in totality before me, I could find no reason to disbelieve or to treat the credibilities of the prosecution witnesses with suspect, in particular that given by PW1, PW2 and PW5. The accused claimed that he was immediately pinned down and saw the police searching around. In the same breath, he said that as he got up, he was shown the offending exhibit by the police. The issue that follows is this: if the police went searching for the drugs how was it possible for the police to show him the offending drugs so soon even before he was handcuffed? The evidence of the prosecution is a lot more cogent and probable. PW1 (and PW5) saw the accused bending down trying to push exh. P9 into the hole, caught the accused by his shoulders, got him to stand up and seized exh. P9 from the accused's hand. This explains why the police were able to show the said offending exhibit almost simultaneously with the arrest of the accused. It is fortified by what was seen by PW2

from outside the window – ie, the accused grabbed the said exhibit and ran towards the rear of the room and tried to push the said exhibit into the hole.

(ii) Even if the position of the appliances and the curtain were as described by the accused and as shown in the photographs resulting in PW2 not being able to see what went on inside the room, this fact could not have negated the evidence of PW1 and PW5, both of whom witnessed the accused bending down trying to push the said offending exhibit into the hole. Both PW1 and PW5 saw what the accused did from a different position altogether.

(iii) Short of accusing the police of planting exh. P9 in the accused's room, the defence was crafted to show that the police had an axe to grind against the accused. The accused testified that the police searched his room and soon after showed exh. P9 to him. He did not know where exh. P9 came from and did not also know where the police got the said exhibit from. The accused further testified that years earlier he was charged in court for an offence under s. 39A of the Act and was acquitted. PW7 was also the I.O in that case and one of the members of the raiding party in this case before me was also a member of the raiding party in that case. In short, the police are trying to fix him with the commission of the present offence.

However, the principal characters in this case before me were PW1, PW2 and PW5. PW1 received a specific information relating to drug trafficking activities in the said premises. He acted upon the information received, resulting in the arrest of the accused. These three witnesses have nothing to do with the earlier case. PW7 happened to be the I.O on duty on that particular day. In such event, it is preposterous to suggest that these four witnesses colluded to fix the accused on a capital crime that carried the death penalty. There is no evidence at all to conclude such findings.

(iv) PW1, PW2 and PW5 in my view were truthful witnesses. Having regard to the whole circumstances of the case, their testimonies were not something which is improbable. They were public officials with no motive to propel them to testify adversely against the accused. Their credibilities were intact

right to the end. In *Public Prosecutor v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859, Gopal Sri Ram HMR (as he then was) said:

> In approaching issues of credibility it is always necessary to bear in mind the tests that a trier of fact should originarily apply when evaluating oral evidence. One of the test is motive. The presence or absence of motive on the part of a witness is a relevant consideration, which a trial court should take into account. See, *Tengku Mahmood v. Public Prosecutor* [1974] 1 LNS 176.
>
> Another relevant consideration are probabilities of the case. If a witness evidence is improbable, this would be a good reason for rejecting his evidence or according it very little weight. By the same token, where the evidence of a witness accords with the probabilities of the case, it would be a serious misdirection on the part of the trial court to give it little or no weight on grounds of credibility. When there is a conflict of evidence in or between the testimony of witnesses, it is the duty of the trier of fact to warm himself of the danger of acting upon the evidence of a given witness. Contradictions within and between the evidence of witnesses there are always bound to be. But that is not a good reason by itself to hold the evidence of a witness to be lacking in credibility. See, *Public Prosecutor v. Dato' Harun bin Haji Idris* [1977] 1 LNS 24. In respect of the assessment of evidence of police officers we can do no better then to quote from the judgment of Thomson CJ in *Public Prosecutor v. Mohamed Ali* [1962] 1 LNS 129:
>
> > When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If his evidence is contradicted by other evidence or is shaken by cross examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.

On the facts, there is nothing inherently improbable with the testimonies given by PW1, PW2 and PW5.

(v) PW1 was the officer who recorded the accused's caution statement. Much was asked by learned counsel over this statement. However, for reasons best known to the defence, this statement was not admitted in evidence. Hence the defence cannot rely on this statement for support as the statement is not in evidence. At any rate the content of the statement is negative. It has no bearing on the evidence produced by the prosecution nor add value to the accused's defence.

(vi) The accused's testimony that he was no longer a drug addict and was then under medication to rid his addiction is a recent invention on account that it was never put to the prosecution witnesses. It is equally irrelevant for the purposes of his defence. It is never part of his defence that the offending drugs are for his personal consumption.

(vii) Upon the totality of the evidence I am with the learned DPP's submission that the defence of the accused is a simple denial. The accused merely denied that he was caught trying to push the offending exhibit into the hole, he denied he was arrested while in the act of doing so and he denied that the said offending exhibit was seized from his hand. Such denial is insufficient without other proof to reasonably dislodge the prosecution's case. In *D.A Duncan v. PP* [1980] 1 LNS 12, the Federal Court stated:

> The defence was in effect, a simple denial of the evidence connecting the appellant with the four boxes. We cannot see any plausible ground for saying that the four boxes were not his. In the circumstances of the prosecution evidence, the High Court came, in our view, to the correct conclusion that this denial did not cast a doubt on the prosecution case against the appellant.

[30] At this stage, the business of the court is to consider whether the evidence of the accused has thrown a reasobable doubt on the truth of the prosecution case and, if so, the accused is entitled to an acquittal – *Mohamed Yatin b. Abu Bakar v. Public Prosecutor* [1950] MLJ 57. Having considered the evidence in its entirety, I am satisfied that the defence posited by the accused has not created any reasonable doubt against the prosecution's case. Equally the defence of the accused failed on the balance of

probabilities, to rebut the statutory presumption under s. 37(da)(iiia) of the Act. The prosecution, on the other hand, had proved the offence against the accused beyond a reasonable doubt.

[31] The accused is thus found guilty and convicted of the offence as proffered. Accordingly he is sentenced to hang by rope by his neck until he is dead.